LIBRARY
SUPREME COURT, U. S.

APR 12 1972
CLERK

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-852

C. D. CONSTRUCTION CORPORATION,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petition for Rehearing and Supplemental Brief.

GEORGE T. ALTMAN,
424 South Beverly Drive,
Beverly Hills, Calif. 90212.
Attorney for Petitioner.

Of Counsel:
STANLEY H. WILEN,
326 St. Paul Place,
Baltimore, Md. 21202.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-852

C. D. CONSTRUCTION CORPORATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petition for Rehearing and Supplemental Brief.

Petitioner hereby petitions this Court for rehearing of its petition for a writ of certiorari.

The original petition herein was denied March 20, 1972. This petition for rehearing is based on the decision and opinion of this Court in *Commissioner v. First Security Bank*, No. 70-305, decided on the next day, March 21, 1972. It is for that reason that we regard this petition for rehearing as also a supplemental brief under Rule 24(5).

As this Court noted in its opinion in the *First Security Bank* case, in footnote 11, it decided that case on a different ground from that relied on by the Tenth Circuit there. The decision below herein is in important elements inconsistent with that new ground. In connec-

tion with one of those inconsistencies we shall refer to two excerpts from the opinion of the Court below in the related *Charles Town, Inc.* case, 372 F.2d 415. They are shown in the footnote below.[1]

1. The essence of this Court's position in *The First Security Bank* case is stated in the following quotation from its opinion:

> "In cases dealing with the concept of income, it has been assumed that the person to whom the income was attributed could have received it."

Thus the Court places in a separate category income actually received by a person whether or not rightfully received; and where the income is not actually received by the person, the attribution of the income to him is limited to situations in which he *could have received it*, and could have received it *rightfully*. Generating the income, or earning it, is not enough. Income not received by a person cannot be attributed to him unless he had, not just the power, but the *right* to receive it.

For this reason we point out again, as we did in our original petition, at p. 7, that nowhere did either the court below, or the Tax Court, challenge the validity, the fairness, or the reasonableness, of either of the contracts between Charles Town, Inc. and Fairmount Steel Corporation (hereinafter referred to as Charles Town and Fairmount, respectively). And how, absent such a

[1] At page 416: "The Commissioner's allocation under Section 482 is predicated on the alleged shifting of profits from one controlled entity (Charles Town) to another (Fairmount) for the purpose of utilizing net operating loss carryovers of the latter."

At page 418: "Fairmount's return for its fiscal year ended June 30, 1959, showed a net profit of $732,299.86 from the racing meets, but because of its allowable net operating loss carryover, it paid no federal income tax on this amount."

challenge, Charles Town had the *right*, at *any time at all*, to receive the income attributed to it under Section 482, as its income, as belonging to it, has never even been argued by respondent.

2. Since the present proceeding presents only the liability of petitioner's predecessor, Fairmount, as transferee of Charles Town, we do not, of course, question the liability of the latter corporation after the decision against it became final, regardless of its merits. This makes all the more important, however, the point shown at pp. 12-13 of our original petition that a liability for taxes determined under Section 482 is not self-assessing, and the conclusion which follows therefrom, as stated in *Interstate Fire Insurance Company v. U.S.*, 215 F. Supp. 586, 598, affirmed "in all things" and for "the reasons set forth therein," C.A. 6, 339 F.2d 603: "The use and application of section 482 does not result in an enforcible tax consequence until there has been a reallocation resulting in a reassessment of taxes." To this must now be added, because of this Court's decision in No. 70-305, a *correct* reallocation resulting in a reassessment of taxes.

The Court below avoided reference to that decision of the Sixth Circuit. But certainly that does not erase the conflict with it.

3. This Court, in its opinion in No. 70-305, makes it clear that a right cannot be assumed if it is one prohibited by law. Yet the Court below herein treated Fairmount in substance as a stockholder of Charles Town even though, under the law of the state, as shown in our original petition, at p. 9, Charles Town had no authority to issue the stock so imputed. It follows that the treatment by the Court below, of Fairmount as

in substance a stockholder of Charles Town, is in conflict, not only with *Commissioner v. Stern*, 357 U.S. 39, but with the decision now of this Court in No. 70-305.

We take advantage of this point also to repeat that this issue of stockholding "in substance" was not raised here in the Tax Court, the trial court. The least that the Court below should have done was to return the case to that Court for retrial on that issue.

4. We come now to the excerpts from the *Charles Town, Inc.* case shown in footnote 1 above. As shown there, the Court below observed that the Commissioner's allocation under Section 482 was "predicated on the alleged shifting of the profits from one controlled entity (Charles Town) to another (Fairmount) for the purpose of utilizing net operating loss carryovers of the latter."

In No. 70-305, in footnote 4, this Court makes it clear that Section 482 could not be used for any such purpose. It could not be used, this Court there said, to prevent taxpayers from "lawful structuring [of their business affairs] to minimize taxes." It could not be used then to prevent a taxpayer from structuring his business affairs so as to be able to deduct net operating losses incurred. Indeed, if a tax could ever be said to be immoral it would be so if because of mere artificial corporate barriers the very persons whose control resulted in the application of Section 482 could not deduct their net operating losses. We submit the purpose stated by the Court below for the application of that section is in clear conflict with this Court's opinion in No. 70-305.

For the reasons stated above, we urge grant of the writ of certiorari. At least, in view of the fact that we had no opportunity to apply the new ground stated by this Court in No. 70-305 before it acted on our petition for the writ, we suggest alternatively that the case be sent back to the Court below, in accordance with the practice in this Court, for reconsideration in the light of this Court's opinion in No. 70-305,[2] as well as reconsideration of the issue of stockholding "in substance" not raised, as noted above, in the trial court.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

Of Counsel:
STANLEY H. WILEN.

---

[2] See Supreme Court Practice by Stern and Gressman, Fourth Ed., p. 221 at fn. 32 and the numerous cases cited there on the same point.

Certificate of Counsel.

This petition for rehearing is presented in good faith and not for delay and is restricted to the grounds stated in Rule 58(2).

GEORGE T. ALTMAN